Supreme Court, U.S.
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No. 92-1561

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

RENSSELAER CENTRAL SCHOOL CORPORATION,
Petitioner,

v.

JOSHUA H. BERGER and MORIAH H. BERGER,
b/n/f ALLEN H. BERGER,
Respondents.

On Petition for Writ of Certiorai to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Except for brief argument on the law relating to public fora and decisions in other courts, the Respondents ("Bergers"), essentially devote the balance of their *Brief* to factual arguments. As a consequence, the Petitioner ("Rensselaer") will primarily address the factual arguments made by the Bergers in their *Brief*. The factual errors by the Bergers divide handily into three major categories: monumental errors, moderate errors and minimal errors.

I. BERGERS' MONUMENTAL ERRORS.

A. The Bergers' Assertion that No Speakers Expressed Themselves to Students on Rensselaer Campuses is Factually Incorrect.

Throughout the Bergers' *Brief* they attempt to give the impression to this Court that no speakers appeared on Rensselaer campuses and addressed students.[1] They suggest that there is no "evidence" of speeches to Rensselaer students (*Brief*, p. 9).

Superintendent Dinsmore's testimony that the 4-H, Boy Scouts of America, Tri-Kappa Sorority, Gideons International and other unnamed groups, came to the school to "speak to students" (*App.* p. 464) is certainly evidence before the Court on this point.

The Bergers even refer to a statement by Rensselaer in its Brief that "Rensselaers' classrooms have been opened, during class hours, to various speakers from the community and to a diverse assortment of printed literature from private citizens . . ." as a statement which "is misleading at best and a misrepresentation at worst". *Respondents' Brief* p. 10. The Bergers then attempt to buttress this somewhat serious characterization of the Rensselaer position by referring to a number of pages (pp. 458, 460, 509, 626-628, 556) of the Appendix in this case. However, none of the cited pages support their assertion, nor serve to nullify Dinsmore's testimony as to speakers.

Consequently, the effort by the Bergers to prove that there were no speakers on the Rensselaer campuses must be seen as a representation which is unsupported in the record. If there is any failing in this particular area, it is the failure of the Bergers to neglect to ask any other

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[1] Bergers dispute Rensselaer's reference to its campuses, as an attempt to add an aura of "intellectual sophistication." However, the district court also employed this term in its Opinion, referring to the Rensselaer "campus". (*Petition*, p. 40a).

deponents at their respective depositions as to the matter of speakers on the campuses. Consequently, the only probative evidence before the court was that various speakers from various groups appeared at the Rensselaer campuses over the years prior to the bringing of this suit.

The Bergers' argument is in further direct contradiction of both the district and circuit court findings in this case. The district court referred to "exposure to the many facets of their local community (including the religious)" (*Petition*, p. 42a) and the circuit court made reference to the "*talks* by groups such as the Boy Scouts, the 4-H Club and a sorority" and other references to speech by outside persons entering the Rensselaer campuses (*Petition*, p. 12a, emphasis added).[2]

Though the Bergers might not like the evidence in the record, the evidence is uncontradicted that *speakers* entered the Rensselaer campuses, made 'talks" to students and distributed literature. Therefore, it is a monumental error to suggest, as the Bergers have (*Brief*, p. 9), that there is no evidence that speakers addressed Rensselaer's students.

B. The Bergers have Mischaracterized the Actions of the Gideons, who did not Abuse Rensselaer's Policy by Proselytizing Students.

A quick reading of the Bergers' *Brief* could lead a casual observer to conclude that this is a case about proselytizing by the Gideons, and that the proselytizing is proven by an affidavit by a student, Lisa Suhr. The Bergers rely regularly and heavily on Ms. Suhr's affidavit to support their argument that the Gideons pros-

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[2] The circuit court, though acknowledging the evidence that speeches occurred on Rensselaer's campuses, decried the speeches as "isolated" and "irregular", though there is nothing in the Record to indicate frequency. The circuit court failed to state any jurisprudential basis for its holding that the number of speeches given was too "few" to meet Constitiutional standards.

elytized when they were on campus. The Bergers even state on page i of their *Brief* under the Questions Presented section that a "sectarian religious organization . . . proselytize(d) . . ." in school buildings. (*Brief*, p. i). On page 6 of Bergers' *Brief*, the Bergers refer to the "inside back cover" of some of the Gideons' Bibles as containing a place for a personal signature of each student for a confession of personal faith.[3]

Throughout the Argument section of their *Brief* the Bergers make repeated references to alleged proselytizing efforts by the Gideons. (*Brief*, pp. 17, 20, 22, 28). What is striking in this monumental error, however, is the fact that the Bergers have full knowledge, from the prior proceedings in this case, that Lisa Suhr's affidavit has been discredited. Lisa Suhr stated in her affidavit that she had received a green-covered Bible. *App.* pp. 275-281. However, Gideon member Kooy, *App.* pp. 758-759, stated that the Bibles distributed were always red-covered and did not contain the proselytizing material which is in the green-covered Bibles, distributed by Gideons other than in elementary or high schools. Virtually everyone testifying in the case remembered the play on words by the Gideons that because the Bible had a red cover "it was meant to be read" therefore casting great doubt on Lisa Suhr's affidavit and the frequent reference by the Bergers' as to the proselytizing material in the "green-covered" Bible. *Brooks* dep., *App.* p. 567; *Lewis* dep., *App.* p. 641; *Kooy* dep., *App.* p. 752; *Bosgraff* dep., *App.* pp. 792-793 and *Bozell* Affidavit, *App.* p. 798.

David S. Bosgraff submitted to the court an affidavit in which he stated that the Gideons had:

> "never distributed to students in the Rensselaer school system, or any other public school system, Gideon Bibles which contained printed sections in the

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[3] The Bergers twice incorrectly identify the affidavit as that of Mindy Suhr, instead of Lisa Suhr, who is the correct affiant. (*Brief* pp. 6, 7).

> inside back cover of the Bible separately setting forth scripture and a place for the personal signature of each student under a confession of faith entitled 'My Decision to Receive Christ as My Savior'. Bibles containing these pages are only distributed to college students who are outside of public schools, and have never been distributed by the Jasper County Camp of Gideons International to students in the Rensselaer school system." (*App.* pp. 792 and 793)

In adidtion, Bosgraff stated that "it was always two men, and never a man and a woman" who distributed Bibles, and consequently the statement in Lisa Suhr's affidavit that she remembered a man and a woman passing out Bibles, which she recalled as a "Mr. and Mrs. Gideon" must throw further doubt on Lisa Suhr's affidavit.

As to the actual message conveyed by the Gideons to Rensselaer students, both the district and circuit court referred to the brief non-proselytizing messages by the Gideons. The district court stated that the Gideons "did not engage in a proselytizing recitation of scripture and verse." *Petition* p. 42a. The circuit court referred to the red-covered Bibles as being the Bibles which were distributed by the Gideons and cited the pun made about the cover. *Petition* p. 8a. The circuit court further referred to the fact that the Gideons spoke for a minute or two "about their organization". *Petition,* p. 8a. Hardly a finding that the Gideons proselytized.

Therefore, the Bergers have monumentally erred in attempting to portray that which did not occur. This was *no* "religious exercise". The Gideons did not abuse their privilege of literature distribution in the Rensselaer school system by proselytizing the students therein.

C. The Bergers Err in Arguing that the Circuit Court Opinion is Consistent with *Lee*.

In the first major section of the Bergers' *Brief* (pp. 14-18), they state that the opinion of the circuit court

is consistent with *Lee v. Weisman*, —— U.S. ——, 112 S. Ct. 2649, 120 L. Ed. 2d 745 (1992). However, the four page argument submitted by the Bergers to support this position fully ignores the argument by Rensselaer on this point. Rensselaer noted in its Petition (also at pp. 14-18) that the circuit court completely overlooked the twenty-three references to a "religious exercise", albeit an overt, formal and explicit religious exercise, prayer, which occurred in Providence, Rhode Island in *Lee*. The Gideons' non-proselytizing short talks about their organization, and following distribution of abridged-Bibles, did not constitute a "religious exercise." Therefore, the Bergers have the unenviable task of trying to apply *Lee's* proscription against state-sponsored "religious exercises" to what was clearly not a "religious exercise" (*Petition* p. 42a).

The point raised by Rensselaer in its Petition is obviously that the school decided in *Lee* to have a "religious exercise." In the instant case, however, the school only opened its campuses to private speakers and one of the private speakers entering the campuses happened to be religious. In the instant case, Rensselaer *never* decided to have any religious exercise and there is *nothing* in the record to show that Rensselaer ever framed or composed its campus literature distribution policy to favor in any manner the distribution of religious materials.

Therefore, the Bergers have the same problem as the circuit court had in relying almost entirely on *Lee*, in that *Lee* really doesn't apply to the case at bar for all of the reasons as set forth above.

D. The Bergers' Argument that the Seventh Circuit Opinion is Consistent With *Lemon* is Likewise Misplaced.

The Bergers are presented with an equally difficult task in trying to maintain, as they do on pages 18 through 22 of their *Brief*, that the circuit court decision is con-

sistent with *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 123 (1971). The Bergers argue that the Rensselaer literature distribution policy has the effect of endorsing Christianity.

What is most perplexing for the Bergers is that though they argue at length that the literature distribution policy has the effect of endorsing Christianity, the circuit court thought so little of this argument that it only made brief mention of it in a single line when it held that the policy has "the effect of sending a message to an objective observer that the (school) Corporation endorses the Gideons' beliefs. . . ." However, the circuit court then wholly failed to explain how it arrived at its conclusion, nor does it set forth with any additional analysis why Rensselaer's literature distribution policy "endorsed" a particular religion. (Though which religion, Christianity or Judaism, both of whose sacred texts were distributed, is not stated.) Consequently, though the Bergers have labored mightily to try to make the argument, the circuit court did not arrive at a studied and cohesive conclusion on this point.

The Bergers then argue that the Rensselaer policy violates the third prong of the *Lemon* analysis, i.e., entanglement. At this point in their Brief the Bergers make no argument of their own, deferring instead to six quoted paragraphs from the circuit court's opinion relating to entanglement. Consequently, Rensselaer would refer the Court to the district court's determination that Rensselaer's involvement did *not* excessively entangle it with religion. See *Petition* pp. 42a-43a.

II. BERGERS' MODERATE ERRORS.

A. The Bergers' Contention that Rensselaer Failed to Create a Limited Public Forum is Incorrect.

Rensselaer would rely upon the argument made on pages 21 through 23 of its *Petition* on this point. In addition, it should be noted that this Court has recog-

nized the principle that government may designate a public forum, while at the same time limiting that forum according to certain neutral, legitimate criteria. Government, for example, may open a forum limited to certain *media* of expression, such as drama (see *Southeastern Promotions Ltd. v. Conrad*, 429 U.S. 167 (1976)), or certain *classes of speakers*, such as students, (see *Widmar*), to official bargaining representatives (see *Perry Educational Association v. Perry Local Educators Association*), 460 U.S. 37 (1983), or to direct service providers (see *Cornelius v. NAACP Legal Defense and Educ., Inc.*, 473 U.S. 788 (1985)) or limited to certain subject matter such as school board business (see *Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976)). The difficulty arises, of course, when government attempts to stray from neutral *regulations* on speaker status, subject matter or manner of speech, and instead begin *censoring* the content or viewpoint of otherwise eligible speakers and speech. This violates the First Amendment. *E.g., Widmar v. Vincent*, 454 U.S. 263 (1981) (unconstitutional to ban religious speech by otherwise eligible speakers); plus see *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 573-76 (9th Cir. 1984), cert. *denied* 471 U.S. 1054 (1985).

B. Teachers Did Not Line Up Students to Receive Bibles in the Rensselaer Schools.

The Bergers state in their *Brief* that teachers "directly participate(d)" in the distribution of Bibles by the action of "lin(ing) up the students to receive Bibles" (p. 17). However, even the circuit court acknowledged that it was in error in its original opinion when it stated that students were "lined up." In its Amended Order of January 5, 1993 the circuit court removed the words "lined up and" so that the sentence now reads "After the presentation, the students were instructed to take a Bible from a stack of Bibles placed on a table or desk." (See

Petition, p. 45a).[4] The circuit court even went so far as to hold that "The teachers, though present, did not participate in handing out the Bibles" (*Petition*, p. 8a). Consequently, the representation by the Bergers that the teachers in some manner "lined up" students in the classroom to receive Bibles is contrary to the Record.

C. The Bergers' Assertion that the Policy was not Content Neutral is Incorrect.

On page 9 of the Bergers' *Brief* they state that Rensselaer "disingenuously" describes its policy as "content neutral" and "viewpoint neutral." However, Rensselaer is not alone in describing the policy as being content neutral and viewpoint neutral. The district court held that "The policy on its face is content neutral; it does not mention a supreme being, the holy scripture or make other religious reference." *Petition*, p. 40a. The circuit court likewise stated "The policy itself does not treat religion directly, and, thus, on its face, raises no Establishment Clause concerns." *Petition*, p. 5a, footnote 3.

III. BERGERS' MINIMAL ERRORS.

A. The Record Confirms, and is Without Contradiction, that Extra Minutes Outside of Instructional Time were Used for "Release Time" or for Other Purposes, Such as Listening to Speakers and Receiving Literature.

On page 12 of Bergers' *Brief* they characterize Superintendent Dinsmore's testimony as to the extra minutes provided in each day according to a 1988 directive from the State Department of Education as "convoluted".

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[4] As noted in Rensselaer's *Petition*, this finding by the circuit court, that the students were "instructed to take a Bible" is likewise factually incorrect as the teacher took no part, hence did not "instruct" and the Gideon representative only *asked* students to take one if their parents would approve.

However, it is obvious that the Bergers do not appreciate Superintendent Dinsmore's testimony that "we have extra minutes without instructional time that we can utilize for release time" because it contradicts their argument, that in some manner, the distribution of literature in the classrooms was within instructional time. However, no matter how "convoluted" the testimony may be in the eyes of the Bergers, nevertheless, Superintendent Dinsmore's testimony is uncontradicted on this point.

B. The Bergers' Repeated Reference to Fifth Graders as Ten Years Old is Partially Incorrect.

In Indiana, by statute, a student must begin elementary education by the age of seven. Consequently, the reference by the circuit court to fifth graders as either ten *or eleven* years old (*Petition,* p. 11a) is more on the mark. The Bergers longingly refer to fifth graders as "sensitive and impressionable" (*Brief* p. 22). Were it so. Though this description of fifth graders has a certain melancholy appeal, any parent with a fifth grade child recognizes that in today's culture fifth graders know more about life and the realities of contemporary society than similarly-aged students of decades past.

CONCLUSION

For the foregoing reasons, and for the reasons as set forth in the initial Petition For Writ of Certiorari, this Court should reverse the judgment of the Seventh Circuit.

Respectfully submitted,

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